APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States Court of Appeals for the Sixth Circuit

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT CO., CRAWFORD & COMPANY, AND DR. SAUL MARGULES

Defendants-Appellees.

No. 05-2089

Argued July 27, 2006.

Decided Oct. 23, 2008.

BEFORE: MOORE and GIBBONS, Circuit Judges; and ACKERMAN, District Judge.*

KAREN NELSON MOORE, Circuit Judge.

This case involves the dismissal of the claims of Plaintiffs-Appellants Paul Brown, William Fanaly, Charles Thomas, Gary Riggs, Robert Orlikowski, and Scott Way (collectively referred to as "plaintiffs") against Defendants-Appellees Cassens Transport Company ("Cassens"), Crawford & Company ("Crawford"), and Dr. Saul Margules (collectively referred to

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* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

as "defendants") under Federal Rule of Civil Procedure 12(b)(6). The plaintiffs alleged that the defendants employed mail and wire fraud in a scheme to deny them worker's compensation benefits under the Michigan Worker's Disability Compensation Act ("WDCA"), MICH. COMP. LAWS § 418.301, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961(1)(B), 1962(c), 1964(c), and that the defendants' conduct constituted intentional infliction of emotional distress ("IIED") under Michigan law. The plaintiffs appealed the district court's dismissal of their RICO claims based on the reverse preemption of the RICO claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and for failure to plead certain claims with particularity, for failure to allege a pattern of racketeering activity, and for failure to plead reliance on the defendants' fraud. A divided panel of this court affirmed the district court's dismissal of plaintiffs' RICO claims because plaintiffs had failed to plead detrimental reliance on alleged misrepresentations of defendants. The Supreme Court vacated our judgment and remanded for further consideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, ___ U.S. ___, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008), which held unanimously that a civil-RICO plaintiff does not need to show that it detrimentally relied on the defendant's alleged misrepresentations.

On remand, we **REVERSE** the district court's dismissal of plaintiffs' RICO claims because the WDCA does not preempt their RICO claims and because plaintiffs have sufficiently pleaded a pattern of racketeering activity given that reliance is not an element of a civil RICO fraud claim. We **REMAND** to the district court for further proceedings consistent with this opinion. The plaintiffs also appeal the

district court's dismissal of their IIED claims for failure to plead outrageous conduct. We **AFFIRM** the dismissal of the IIED claims because the alleged conduct of these defendants could not be deemed outrageous under Michigan law.

I. BACKGROUND

Plaintiffs are current or former employees of Cassens who have submitted worker's compensation claims to Cassens based on workplace injuries they have each sustained. On June 22, 2004, plaintiffs filed a complaint raising RICO and IIED claims against the defendants. Plaintiffs alleged that Cassens, which was self-insured for purposes of paying benefits under the WDCA, contracted with Crawford to serve as a claims adjuster for the worker's compensation claims of Cassens's employees. They further pleaded that Cassens, Crawford, and Margules, as well as other "cut-off" doctors, engaged in a pattern of racketeering activity that denied the plaintiffs' worker's compensation claims. Specifically, the plaintiffs alleged that Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions that would support the denial of worker's compensation benefits, and that defendants ignored other medical evidence in denying them benefits. The plaintiffs claimed that the defendants made fraudulent communications amongst themselves and to the plaintiffs by mail and wire in violation of 18 U.S.C. §§ 1341, 1343, which serve as the predicate acts for their RICO claims.

The district court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) on July 15, 2005. *Brown* v. *Cassens Transp. Co.*, 409 F. Supp. 2d 793 (E.D. Mich. 2005). The plaintiffs filed this timely

appeal.[1] A majority of this panel affirmed the dismissal on the ground that plaintiffs failed to plead that they relied on misrepresentations by defendants. *Brown* v. *Cassens Transp. Co.*, 492 F.3d 640, 643, 646 (6th Cir. 2007). The U.S. Supreme Court granted plaintiffs' petition for a writ of certiorari, vacated our judgment, and remanded the case to us for reconsideration in light of *Bridge*. *Brown* v. *Cassens Transp. Co.*, ___ U.S. ___, 128 S. Ct. 2936, 171 L. Ed. 2d 862 (2008).

II. STANDARD OF REVIEW

We review de novo a district court's determination dismissing a suit for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *Hill* v. *Blue Cross & Blue Shield*, 409 F.3d 710, 716 (6th Cir. 2005). The plaintiffs' factual allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiffs. *Id.* We will not affirm the district court's dismissal of a complaint on Rule 12(b)(6) grounds "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Id.* (alteration in original) (internal quotation marks omitted).

III. DISMISSAL OF THE CLAIMS OF THOMAS AND RIGGS FOR FAILURE TO STATE A PATTERN

A. General Contours of the RICO Pattern Element and the District Court's Approach

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[1] The plaintiffs filed a motion for leave to file an amended complaint, but they did not appeal the district court's denial of this motion in their Notice of Appeal. Therefore, that decision is not before us. FED. R. APP. P. 3(a)(1).

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 [18 U.S.C. § 1341] (relating to mail fraud), section 1343 [18 U.S.C. § 1343] (relating to wire fraud)." *Id.* § 1961(1). Plaintiffs claim that defendants engaged in the racketeering activities of mail and wire fraud.[2]

RICO states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). On this basis, the district court assumed that alleging two acts of racketeering activity was sufficient to state a pattern, and dismissed the claims of Riggs and Thomas because they sufficiently pleaded only one act each of racketeering activity. The plaintiffs appeal this conclusion, claiming that the district court was instead required "to look at the pattern of defendants' alleged scheme against the group" rather than "the number of predicate acts al-

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[2] Plaintiffs also pleaded that defendants engaged in witness tampering in violation of 18 U.S.C. § 1512, which also constitutes a predicate act of racketeering under RICO, *see* 18 U.S.C. § 1961(1)(B). The district court dismissed the witness-tampering claims, and plaintiffs do not press these claims on appeal.

legedly committed against each victim." Appellants Br. at 25-26.

B. The District Court Erred by Focusing on the Number of Predicate Acts Alleged by Each Plaintiff

RICO's provision authorizing civil suits, 18 U.S.C. § 1964(c), sheds light on the issue of predicate acts. Section 1964(c) states that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" may bring a RICO suit. RICO specifies only that the defendant must have engaged in a "pattern of racketeering activity" to violate 18 U.S.C. § 1962. As long as the defendant engaged in a pattern of racketeering activity, and the plaintiff was injured by this pattern of activity, this suffices to state a claim under 18 U.S.C. § 1964(c); nowhere does the statute require that the injury to each plaintiff must have independently consisted of a pattern of activity by the defendant. *See H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (looking only to the activities of defendants and not the number of predicate acts against each plaintiff in assessing whether a pattern of racketeering was sufficiently pleaded); *Vild* v. *Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992) ("We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts, because harm from one enumerated violation may, in certain situations, be sufficiently connected."). Therefore, the district court erred in assessing the pattern requirement by counting the number of predicate acts alleged by each plaintiff. Rather, the district court should have considered whether the plaintiffs sufficiently pleaded that the defendants were engaged in a "pattern of racketeering activity," and, if

so, whether they also sufficiently pleaded that each plaintiff was injured by this pattern of activity.

Although the defendants do not appear to take issue with the district court's holding that two predicate acts constitute a "pattern of racketeering activity," and thus that a pattern was specifically pleaded by Brown, Fanaly, Way, and Orlikowski,[3] *see* Appellees Br. at 16 (requesting that the district court's decision on whether a pattern was established be upheld), we must consider whether the defendants were engaged in a "pattern of racketeering activity" to determine whether the district court erred in dismissing the claims of Riggs and Thomas for failure to state a pattern.

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[3] The district court's treatment of Orlikowski's claim is confused. The district court noted that Orlikowski "fails to specify the means of the communication" with regard to one of the two predicate acts he alleges, *Brown*, 409 F. Supp. 2d at 806 (commenting on the allegation in paragraph fifty-seven), and thus does not satisfy the requirement under Federal Rule of Civil Procedure 9(b) that a plaintiff allege, at a minimum, "the time, place and contents of the misrepresentation(s)," *Bender* v. *Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). However, the district court simply dismissed the claims of Thomas and Riggs for failure to plead a "'pattern of racketeering activity'" on the ground that each alleged only one predicate act of fraud directed at him. *Brown*, 409 F. Supp. 2d at 806. Given the district court's apparent conclusion that only one of Orlikowski's two alleged predicate acts was sufficiently pleaded, it is not clear why the district court dismissed solely the claims of Thomas and Riggs for failure to plead a pattern. Ultimately, the district court's view of Orlikowski's claims is immaterial because, as we later make clear, Orlikowski has sufficiently pleaded a RICO pattern on the basis of the alleged conduct of the defendants, regardless of the precise number of acts he alleges relate specifically to him.

C. Defining a Pattern of Activity Under RICO: Relationship and Continuity

The district court's assumption that two predicate acts constitute a pattern under 18 U.S.C. § 1961(5) in finding a pattern with regard to the claims of Brown, Fanaly, Way, and Orlikowski fails to heed the Supreme Court's definition of "pattern" set forth in *H.J. Inc.*, 492 U.S. at 238-43, 109 S. Ct. 2893. In *H.J. Inc.*, the Supreme Court held that "while two [predicate] acts are necessary, they may not be sufficient." *Id.* at 237, 109 S. Ct. 2893 (internal quotation marks omitted). Beyond setting forth the minimum number of predicate acts required to establish a pattern, § 1961(5) "assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved." *H.J. Inc.*, 492 U.S. at 238, 109 S. Ct. 2893. "Congress intended to take a flexible approach" to satisfying whatever is required beyond the minimum number of predicate acts, "and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." *Id.* Within the numerous sorts of relationships that can constitute a pattern, two elements must be shown: "that the racketeering predicates are *related, and* that they amount to or pose a threat of *continued* criminal activity." *Id.* at 239, 109 S. Ct. 2893 (first and third emphases added).

A relationship among predicate acts is established when they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240, 109 S. Ct. 2893 (internal quotation marks omitted). The "use of the disjunctive suggests that the

Court meant to craft a broad test of relatedness." *United States* v. *Blandford,* 33 F.3d 685, 703 (6th Cir. 1994).

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.,* 492 U.S. at 241, 109 S. Ct. 2893. Continuity may be demonstrated in a number of ways. Closed-ended continuity can be shown "by proving a series of related predicates extending over a substantial period of time." *Id.* at 242, 109 S. Ct. 2893. Determining whether open-ended continuity has been established requires a court to probe "the specific facts of each case." *Id.*"A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id.* Even when "the number of related predicates involved may be small and they may occur close together in time," if "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future," this "suppl[ies] the requisite threat of continuity." *Id.* A "threat of continuity may [also] be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* Therefore, "the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 242-43, 109 S. Ct. 2893. In addition, "[t]he continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or par-

ticipating in an ongoing and legitimate RICO 'enterprise.' " *Id.* at 243, 109 S. Ct. 2893 (footnote omitted).

D. The Plaintiffs Have Pleaded a Pattern

The plaintiffs have pleaded with sufficient particularity at least thirteen predicate acts, which are comprised of allegedly fraudulent communications by mail and wire, including communications among the defendants and communications from the defendants to the plaintiffs relating to each of the plaintiffs' injuries and claims for benefits under the WCDA. Therefore, plaintiffs have met the minimum two-predicate-acts requirement. *See* 18 U.S.C. § 1961(5); *H.J. Inc.*, 492 U.S. at 237, 109 S. Ct. 2893. The question remains as to whether the plaintiffs have satisfied *H.J. Inc.*'s relationship-plus-continuity standard. We conclude that they have.

First, the predicate acts alleged by the plaintiffs are related. They have the same purpose: to reduce Cassens's payment obligations towards worker's compensation benefits by fraudulently denying worker's compensation benefits to which the employees are lawfully entitled. They have the same result: to deny worker's compensation benefits to certain Cassens's employees who are entitled to such benefits under Michigan law. They have the same participants: alleged in the complaint are worker's compensation officials at Cassens and Crawford, including Tina Litwiller, a claim adjuster for Crawford, and Margules, a doctor who the plaintiffs allege, with regard to some of the predicate acts, fraudulently recommended ineligibility of benefits at the request of Cassens and Crawford. They have the same victims: alleged in the complaint are certain Cassens employees who are eligible for worker's compensation benefits. They have similar methods of commission:

fraudulent misapplication of the legal standards set forth in the WDCA in denying worker's compensation benefits to Cassens's employees by Titwiller, other officials working for defendants, or Margules.

Second, the predicate acts are continuous under either a closed- or open-ended theory. "[P]laintiff[s] may prove [closed] continuity by showing a series of past related predicates occurring over an extended period of time," generally more than "[a] few months." *Vild,* 956 F.2d at 569; *see also H.J. Inc.,* 492 U.S. at 242, 109 S. Ct. 2893 (noting that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement"). The plaintiffs have alleged a series of related predicate acts that span well over three years. This constitutes a period of closed-ended continuity.

As for open-ended continuity, the Supreme Court has explained that an open period of continuity is stated when "the predicates are a regular way of conducting defendant's ongoing legitimate business." *H.J. Inc.,* 492 U.S. at 243, 109 S. Ct. 2893. The plaintiffs allege precisely that. Specifically, the plaintiffs allege that the legitimate business or part of the legitimate business of each of the defendants—addressing its employees worker's compensation claims for Cassens, worker's compensation claim administration on behalf of Cassens for Crawford, and offering his medical opinion on worker's compensation claims for Margules—is regularly conducted by fraudulently denying benefits to which the employees are entitled through the use of fraudulent communications by mail and wire. Although the plaintiffs do not specifically allege that this conduct is ongoing, given that "the threat of continuity need

not be established solely by reference to the predicate acts alone," and that "facts external to the predicate acts may, and indeed should, be considered," *United States* v. *Busacca,* 936 F.2d 232, 238 (6th Cir. 1991) (explaining that "the totality of the circumstances surrounding the commission of the predicate acts are considered to determine whether those acts pose a threat of continuing criminal activity"), the plaintiffs' allegations also state a period of open continuity.

Each of the plaintiffs has also sufficiently pleaded that they were injured by the defendants' "pattern of racketeering activity" under 18 U.S.C. § 1964(c) because the defendants' fraud deprived the plaintiffs of worker's compensation benefits and caused them to incur attorney fees and medical care expenses.[4]

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[4] Federal Rule of Civil Procedure 9(b)'s requirement that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake" has been applied to allegations of fraud made in support of a RICO claim. *See, e.g., Blount Fin. Servs., Inc.* v. *Walter E. Heller & Co.,* 819 F.2d 151, 152-53 (6th Cir. 1987). Rule 9(b) has been construed to require a plaintiff to allege, at a minimum, "the time, place and contents of the misrepresentation(s)." *Bender,* 749 F.2d at 1216. On this basis, the district court dismissed the allegations set forth in paragraphs 12, 16A, 24, 32, 34, and 57 of the complaint for lack of the requisite particularity under Rule 9(b). The plaintiffs argue that this ruling was in error because, under Federal Rule of Civil Procedure 11(b)(3), these allegations "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," and because the defendants had exclusive possession of the particular details related to these allegations of fraud.

The plaintiffs contend that under Rule 11(b)(3) and *Rotella* v. *Wood,* 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000), the district court should have afforded them the opportunity for discovery to flesh out the details of these allegations

IV. RELIANCE AS AN ELEMENT OF FRAUD IN A CIVIL RICO CLAIM

A. Reliance Is Not Required for a Civil RICO Fraud Claim

The Supreme Court recently held "that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation,

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before dismissing them. In *Rotella*, a civil RICO suit alleging fraud, the Supreme Court explained that Rule 11(b)(3) provides "flexibility, ... allowing pleadings based on evidence reasonably anticipated after further investigation or discovery." *Rotella*, 528 U.S. at 560, 120 S. Ct. 1075 (citing *Corley* v. *Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998)). In rejecting the plaintiffs' position, the district court stated that "while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation." *Brown*, 409 F. Supp. 2d at 805. In light of our holding that the plaintiffs have successfully pleaded a "pattern of racketeering activity" *without* considering the dismissed allegations and the liberal amendment standard under Federal Rule of Civil Procedure 15(a), *Tucker* v. *Union of Needletrades, Indus., & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005), we need not consider the correctness of the district court's ruling in dismissing these allegations for lack of particularity. We express no view as to whether the district court should have permitted the plaintiffs to plead additional particular facts after discovery under Rule 11(b)(3), other than to note that such a notion is not foreign to this court. *See Michaels Building Co.* v. *Ameritrust Co.*, 848 F.2d 674, 679-81 (6th Cir. 1988) (holding that plaintiffs alleging RICO civil fraud claims that failed to satisfy Rule 9(b)'s particularity requirement were entitled to opportunity for discovery under Rule 11(b)(3) before their claims were dismissed). Should discovery confirm the plaintiffs' initial beliefs regarding the fraudulent nature of the dismissed allegations and provide the necessary details to satisfy Rule 9(b), the plaintiffs can then amend the complaint to replead the dismissed allegations. *See* FED. R. CIV. P. 15(a); *Tucker*, 407 F.3d at 788.

that it relied on the defendant's alleged misrepresentations." *Bridge* v. *Phoenix Bond & Indem. Co.*, ___ U.S. ___, 128 S. Ct. 2131, 2145, 170 L. Ed. 2d 1012 (2008). Resolving a circuit split, the Court unanimously determined that "first-party reliance is [not] an element of a civil RICO claim predicated on mail fraud." *Id.* at 2137. The Court found that neither the statute nor common-law rules or policy arguments provided a basis for imposing a first-party reliance requirement. *Id.* at 2139. *See also Chaz Concrete Co.* v. *Codell*, 545 F.3d 407, 2008 WL 4629907, at *2 (6th Cir. 2008).

In addition to rejecting a reliance requirement, the Court in *Bridge* also reaffirmed its position in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), that 18 U.S.C. § 1964(c) "requires the plaintiff to establish proximate cause in order to show injury 'by reason of' a RICO violation.'" *Bridge*, 128 S. Ct. at 2141. The Court reiterated that this "'demand[s] ... some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 2142 (quoting *Holmes*, 503 U.S. at 268, 112 S. Ct. 1311). Nonetheless, although first-party reliance might be useful in showing proximate causation, "'the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action.'" *Id.* at 2144 (quoting *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 478, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006) (Thomas, J., concurring in part and dissenting in part)).

After *Bridge*, plaintiffs need not plead or prove that they relied on defendants' alleged misrepresen-

tations in order to establish the elements of their civil RICO claim based on mail or wire fraud. Dismissal of plaintiffs claims on this basis cannot be sustained.

B. Plaintiffs Have Sufficiently Pleaded that Their Injuries Were "By Reason of" the Defendants' Alleged Fraud

Plaintiffs have sufficiently pleaded that the defendants' fraud was directly related to and was the proximate cause of their injuries as required by 18 U.S.C. § 1964(c) under *Holmes,* 503 U.S. at 268, 112 S. Ct. 1311, and *Anza,* 547 U.S. at 456-61, 126 S. Ct. 1991. Accepting the facts as recited in the complaint, the defendants' fraudulent acts were a "substantial and foreseeable cause" of the injuries alleged by the plaintiffs: the deprivation of their worker's compensation benefits and expenses for attorney fees and medical care. *Trollinger* v. *Tyson Foods, Inc.,* 370 F.3d 602, 615 (6th Cir. 2004) (explaining, in a RICO case, that proximate cause is shown when "the wrongful conduct [is] a substantial and foreseeable cause" of the injury and the relationship between the wrongful conduct and the injury is "logical and not speculative"). The "direct causal connection" requirement has been met, as no "intricate, uncertain" inquiries are required to link the defendants' alleged fraud and the plaintiffs' injuries. *Anza,* 547 U.S. at 460, 126 S. Ct. 1991.

V. REVERSE PREEMPTION UNDER THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating

the business of insurance, ... unless such Act specifically relates to the business of insurance." "The McCarran-Ferguson Act thus precludes application of a federal statute in face of state law 'enacted ... for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana, Inc.* v. *Forsyth*, 525 U.S. 299, 307, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999) (alteration in original) (quoting 15 U.S.C. § 1012(b)). The district court concluded that the WDCA reverse preempts RICO under the McCarran-Ferguson Act because RICO does not "relate to the business of insurance," the WDCA was enacted to regulate the business of insurance, and RICO would impair the WDCA. *Brown*, 409 F. Supp. 2d at 808-11. The plaintiffs appeal this conclusion, arguing that WDCA was not enacted to regulate the business of insurance and that RICO will not "invalidate, impair, or supersede" the WDCA.[5]

A. The WDCA Was Not Enacted for the Purpose of Regulating the Business of Insurance

The Supreme Court has explained that "'[s]tatutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the business of insurance,' within the meaning of the phrase [used by McCarran-Ferguson]." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 501, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993) (alteration in original) (quoting *SEC* v. *Nat'l Secs., Inc.*, 393 U.S. 453, 460, 89 S. Ct.

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[5] The parties agree that RICO does not "specifically relate[ ] to the business of insurance." 15 U.S.C. § 1012(b).

564, 21 L. Ed. 2d 668 (1969)). The Supreme Court has also emphasized that

> the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement-these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was-it was on the relationship between the insurance company and the policyholder."

Id. (quoting *Nat'l Secs.*, 393 U.S. at 460, 89 S. Ct. 564).

In determining whether particular practices constitute "'the *business of* insurance'" under the McCarran-Ferguson Act, three factors are considered: "'*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Ky. Ass'n of Health Plans, Inc.* v. *Miller* 538 U.S. 329, 339, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003) (quoting *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S.119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)).[6] No one factor

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[6] The plaintiffs err by asserting that "'a state law regulates insurance if a common sense meaning of the language of the statute indicates that it is specifically directed toward [the insur-

is determinative. *Pireno,* 458 U.S. at 129, 102 S. Ct. 3002.

In assessing whether a state law addresses "the business of insurance" under the McCarranFerguson Act, the Supreme Court has made clear that the focus is on "how to characterize *conduct* undertaken by private actors," rather than "how to characterize *state laws* in regard to what they 'regulate.'" *Ky. Ass'n of Health Plans, Inc.,* 538 U.S. at 337, 123 S. Ct. 1471; *id.* at 340, 123 S. Ct. 1471. There are two possible views as to the forms of conduct or practices that the WDCA encompasses that can be considered in assessing whether the WDCA covers "the business of insurance." First, the worker's compensation benefits mandated by the WDCA can be seen as a form of insurance to provide compensation for workplace injuries, thus perhaps creating an insurance-like relationship in which the employer is the "insurer" and the employee is the "insured." This will be referred to as the "benefits-as-insurance" theory. Alternatively, the WCDA contains provisions regulating how an employer can insure itself to provide worker's compensation coverage that could be seen as part of "the business of insurance." This will be referred to as the "insurance-provisions" theory.

In arriving at the conclusion that the WDCA addresses "the business of insurance," the district court

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ance] industry,'" Appellants Br. at 50 (quoting *Med. Mut. of Ohio* v. *deSoto,* 245 F.3d 561, 573 (6th Cir. 2001)), and then relying on this standard to argue that WDCA was not "enacted ... for the purpose of regulating the business of insurance." This standard relates to the ERISA savings clause rather than to McCarran-Ferguson reverse preemption, and, as the Supreme Court has held, these standards are distinct. *See Ky. Ass'n of Health Plans, Inc.,* 538 U.S. at 339-42, 123 S. Ct. 1471.

appeared to rely on the benefits-as-insurance theory. This understanding of the WDCA is precarious at best. As stated above, "[t]he focus of McCarran-Ferguson is upon the relationship between the *insurance company* and *its policyholders*." *Fabe*, 508 U.S. at 501, 113 S. Ct. 2202 (emphasis added). Under the benefits-as-insurance theory, there is no relationship between an insurance company and a policyholder because worker's compensation benefits are not insurance. Although at first blush worker's compensation benefits may seem to act as a form of insurance because they provide compensation for injuries like many forms of insurance, closer scrutiny reveals that this insurance-like impression is solely a matter of appearance.

Insurance is defined as "[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency." BLACK'S LAW DICTIONARY (8th ed. 2004). There is no contract in the worker's compensation scheme. The district court attempts to dismiss the importance of the lack of a contract under the benefits-as-insurance theory by stating that "[t]he WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them." *Brown*, 409 F. Supp. 2d at 810. However, not only does this view fundamentally misconceive the nature of the worker's compensation scheme, it ignores the text of the McCarran-Ferguson Act, which only applies to state statutes that regulate "the *business of* insurance," 15 U.S.C. § 1012(b) (emphasis added), not those governing employers' obligations to their employees for workplace injuries.

The WDCA is a public regulation of the employment relationship that is a substitute for the tort system rather than any contractual relationship between employees and employers. *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law,* 16 GA. L. REV. 775 (1982). In the context of true contractual accident-insurance relationships, the insurer owes no preexisting duty to the insured to compensate the insured for any injury that the insured may sustain. Rather, as with other contractual relationships, the insured provides consideration in exchange for the insurer's obligation to pay benefits upon the event of an accident. By contrast, in the worker's compensation context, the employer owed the employee a preexisting duty under common-law tort to compensate the employee for workplace injuries due to the fault of the employer. Mandatory worker's compensation schemes, including the WDCA, remove the employee's obligation to prove negligence and causation in exchange for certain benefits in the event of a workplace injury and relinquishing the right to sue (except in cases of intentional torts). However, the employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and worker's compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract. There is therefore no insurer and no insured.

Moreover, under the benefits-as-insurance view, the WDCA does not satisfy the *Pireno* factors. 458 U.S. at 129, 102 S. Ct. 3002. The WDCA does not spread the policyholder's risk because, as just explained, there is no contractual insurance relationship and thus no policyholder in the WDCA benefits-

as-insurance approach. Further, the WDCA certainly is not limited to entities within the insurance industry because the WDCA applies to all Michigan employers and employees except those who are specifically exempted. MICH. COMP. LAWS § 418.111. Therefore, under the benefits-as-insurance view, WDCA cannot be seen as addressing "the business of insurance" because the WDCA is a mandatory, public regulation of the tort-liability relationship between employers and employees rather than a regulation of the contractual insurance relationship that underlies "the business of insurance."

Most important, we emphasize that whether the WDCA addresses any practices related to "the business of insurance" is not the same inquiry as whether the WDCA was "*enacted ... for the purpose of regulating* the business of insurance." "To equate laws 'enacted ... for the purpose of regulating the business of insurance' with the 'business of insurance' itself ... would be to read words out of the statute," which the Supreme Court, and we, "refuse to do." *Fabe,* 508 U.S. at 504, 113 S. Ct. 2202; *see also Ky. Ass'n of Health Plans,* 538 U.S. at 340, 123 S. Ct. 1471 (emphasizing that the McCarran-Ferguson Act is concerned with the purpose of the enactment of the state law); *Genord* v. *Blue Cross & Blue Shield of Michigan,* 440 F.3d 802, 806 (6th Cir. 2006). Therefore, the purpose for enacting the state statute must be considered in assessing this element of McCarran-Ferguson reverse preemption. The district court erred in failing to do so.

The purpose of enacting the WDCA "was to require an employer to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." Edward

Welch, *Worker's Compensation in Michigan: Law and Practice* § 1.2 (4th ed. 2001); *accord Simkins* v. *Gen. Motors Corp.*, 453 Mich. 703, 556 N.W.2d 839, 843-44 (Mich. 1996). In exchange for certainty and ease of recovery for the employee, the employer's liability was limited and defined by making worker's compensation the exclusive remedy except in cases of intentional torts. Welch, at § 1.2; *Simkins,* 556 N.W.2d at 843-44. The Michigan Supreme Court has stated that "[t]he purpose of the [WDCA] as set forth in its title, is to promote the welfare of the people of Michigan relating to the liability of employers for injuries or death sustained by their employees." *Whetro* v. *Awkerman,* 383 Mich. 235, 174 N.W.2d 783, 785 (Mich. 1970). The WDCA's focus on providing certain recovery to employees for workplace injuries while limiting employers' liability rather than the regulation of insurance is underscored by a number of factors. The WDCA was placed in chapter 418 of the Michigan Compiled Laws, which addresses labor matters, rather than in chapter 500, which contains the Michigan Insurance Code. Additionally, the Worker's Compensation Agency rather than the Office of Financial and Insurance Services administers the WDCA. This indicates that the provisions relating to insurance policies within the WDCA were included merely to effectuate the WDCA's primary goal of employee compensation.

Our conclusion that worker's compensation benefits are not insurance and our conclusion that the WDCA was not "*enacted ... for the purpose of regulating* the business of insurance," each independently foreclose the defendants' argument that the WDCA reverse preempts RICO under the McCarran-Ferguson Act. We additionally note that even in the absence of these conclusions that preclude reverse

preemption, the defendants' insurance-provisions theory would not support their reverse-preemption argument. The insurance-provisions theory views the WDCA as regulating "the business of insurance" because there are a number of provisions in the WDCA regarding the insurance an employer may buy to secure payment for worker's compensation benefits. Under the insurance-provisions theory, therefore, the employer is the insured and the company providing the insurance is the insurer. There are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to "the business of insurance." *See Fabe,* 508 U.S. at 502-03, 113 S. Ct. 2202 (indicating that a statute that "prescrib[es] the terms of the insurance contract" is one that "regulates the 'business of insurance'"). Michigan Compiled Laws § 418.621(2) states that every insurance contract providing worker's compensation-benefits coverage to employers must "insure, cover, and protect in the same insurance policy, all the business, employees, enterprises, and activities of the employer." Section 418.621(4) states that "[e]xcept as modified by the director as provided for herein, each policy of insurance covering worker's compensation in this state shall contain the following provisions," and then lists the specific provisions of the insurance policy, which address "Compensation," "Medical services," "Rehabilitation services," "Funeral expenses," "Scope of contract," "Obligations assumed," "Termination notice," and "Conflicting provisions." Section 418.631(1), which sets forth the consequences for an insurer who fails to pay claims for compensation, also relates to "the business of insurance" because it addresses the performance of the insurance contract. *See Fabe,* 508 U.S. at 503, 113 S. Ct. 2202 ("There can be no doubt that the actual per-

formance of an insurance contract falls within the 'business of insurance.' "); *id.* at 504, 113 S. Ct. 2202 (explaining how the performance of an insurance contract satisfies the *Pireno* test). One point is crucial here: Cassens self insures. Therefore, the practices at issue in this case do not relate to those provisions of the WDCA that address the "business of insurance." Moreover, self-insurance does not relate to the "business of insurance" under the McCarran-Ferguson Act because there is no relationship between an insurer and an insured. *See Fabe,* 508 U.S. at 501, 113 S. Ct. 2202.

Because worker's compensation benefits are not a form of insurance and the insurance-policy provisions are a minor element of the WDCA that was not part of the purpose for enacting the law, the WDCA was *not* "enacted ... for the purpose of regulating the business of insurance," and thus it does not reverse preempt the plaintiffs' RICO claims.

B. RICO Would Not Invalidate, Impair, or Supersede the WDCA

Although our conclusion that the WDCA was not "enacted ... for the purpose of regulating the business of insurance," disposes of the defendants' reverse-preemption argument, we note that RICO is also saved from reverse preemption by the WDCA under the McCarran-Ferguson Act because RICO would not "invalidate, impair, or supersede" the WDCA. RICO would not invalidate or supersede the WDCA because RICO would not "render [the WDCA] ineffective" given that those subject to these laws can comply with both simultaneously. *See Humana,* 525 U.S. at 307, 119 S. Ct. 710 ("The term 'invalidate' ordinarily means 'to render ineffective, generally without providing a replacement rule or law[,]' [a]nd the term

'supersede' ordinarily means 'to displace (and thus render ineffective) while providing a substitute rule.'"). The question remains whether RICO would "impair" the WDCA. In construing the term "impair," the Supreme Court explained that "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarranFerguson Act does not preclude its application." *Id.* at 310, 119 S. Ct. 710.

The WDCA bars and imposes sanctions on the denial of benefits to which employees are legally entitled. MICH. COMP. LAWS §§ 418.631, 418.801. A RICO claim here would also act to punish the improper denial of benefits if done as part of a pattern of racketeering activity. "To the extent that the [state] law prohibited practices also prohibited under federal law," the federal law does not "frustrate a goal of [the state] law." *Humana,* 525 U.S. at 310-11, 119 S. Ct. 710 (internal quotation marks omitted). Moreover, the federal interest in protecting individuals against a pattern of racketeering activity based on fraud is "'perfectly compatible'" with the state interest in providing a certain remedy for employees who have suffered workplace injuries. *Id.* at 311, 119 S. Ct. 710. The only aspect of RICO that would arguably impair the WDCA is the difference in the remedies provided for under RICO and the WDCA. RICO allows for treble damages and attorney fees, 18 U.S.C. § 1964(c), whereas the WDCA provides that

> [i]f weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50.00

> per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

MICH. COMP. LAWS § 418.801(2). In *Humana,* the Supreme Court considered whether "a federal law, which proscribes the same conduct as state law, but provides materially different remedies, 'impair[s]' state law under the McCarran-Ferguson Act?" 525 U.S. at 305, 119 S. Ct. 710. The Court answered this question in the negative. *Id.* at 311, 119 S. Ct. 710.

The Court's conclusion in *Humana* applies equally here. First, *Humana* treats the impairment consideration as an "as-applied" challenge that looks to whether the federal statute would impair the state statute in a particular application. In *Humana,* the availability of punitive damages under state law greater than the treble damages available under RICO supported the conclusion that RICO did not impair the state law. 525 U.S. at 312, 119 S. Ct. 710. The Court held this even though the state law would not allow for the imposition of punitive damages "when doing so would threaten the solvency of the defendant" because "the record contains no evidence of insolvency here." *Id.* at 313 n.12, 119 S. Ct. 710. Here, because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance. Therefore, a RICO suit in this case would not impair the WDCA's regulation of "the business of insurance."

Second, unlike the state law at issue in *Humana,* which was also directed at insurance fraud, the WDCA provision regarding sanctions for failure to pay benefits does not appear to contemplate the

fraudulent denial of worker's compensation benefits. Therefore, a RICO suit would not contravene any "*declared* state policy or interfere with [the state's] administrative regime," which does not address the fraudulent denials of benefits. *Humana,* 525 U.S. at 310, 119 S. Ct. 710 (emphasis added). The district court's assertion that a RICO suit would impair the WDCA's policy of limited liability for employers relies on the faulty premise that the state has a policy of limited liability for employers even when they *fraudulently* deny worker's compensation benefits. No authority supports this position. As in *Humana,* the fact that the state "filed no brief at any stage of this lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative regime" further supports the conclusion that there is no impairment here. *Id.* at 314, 119 S. Ct. 710. We therefore hold that the WDCA does not reverse preempt RICO because the WDCA was not "enacted ... for the purpose of regulating the business of insurance" and because RICO would not "invalidate, impair, or supersede" the WDCA.

VI. INTENTIONAL INFLICTION OF EMOTION DISTRESS

After dismissing the plaintiffs' RICO claims, the district court proceeded to address their state-law IIED claims, even though a federal court should typically decline to exercise pendent jurisdiction over a plaintiff's state-law claims after dismissing the plaintiff's federal claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am.* v. *Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The district court addressed these claims because it mistakenly believed that "the resolution of Plaintiffs' IIED

claims is necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiffs' RICO claims under the McCarran-Ferguson Act." *Brown*, 409 F. Supp. 2d at 813. As is clear from our analysis above, the resolution of plaintiffs' IIED claims has no bearing on the reverse-preemption issue, which turns on the purpose of the WDCA and on RICO's effect on the WDCA. Because in this case the "'interests of judicial economy and the avoidance of multiplicity of litigation'" did not trump the interest in "'needlessly deciding state law issues,'" the district court abused its discretion in exercising pendent jurisdiction to decide the plaintiffs' state-law claims. *Moon* v. *Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006) (quoting *Landefeld* v. *Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993)). Despite the district court's error in addressing the plaintiffs' IIED claims, because we are reversing the dismissal of plaintiffs' federal RICO claims, we will proceed to review the district court's decision dismissing the IIED claims.

In construing questions of state law, a federal court must apply state law in accordance with the controlling decisions of the highest court of the state. *Meridian Mut. Ins. Co.* v. *Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999). "The Michigan Supreme Court has never formally recognized IIED as a cause of action." *Moon*, 465 F.3d at 728 (citing *Roberts* v. *Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905, 913 (Mich. 1985)); *see also Smith* v. *Calvary Christian Church*, 462 Mich. 679, 614 N.W.2d 590, 595 (Mich. 2000) (Weaver, C.J., concurring). Assuming such a claim does exist, a plaintiff must show the following elements to establish an IIED claim: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress."

Roberts, 374 N.W.2d at 908 (internal quotation marks omitted). The Michigan Supreme Court has described "extreme and outrageous conduct" as follows:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 908-09 (internal quotation marks omitted).

In applying this standard, the Michigan Supreme Court held that a no-fault insurer's "failure ... to facilitate the filing of a replacement services claim, a delay of at most six months in responding to the claim as filed, and the denial of benefits owed" was insufficient to meet the standard for outrageous conduct. *Id.* at 911. In arriving at this conclusion, the court noted that "[t]here is no indication that [the insurer] set out to harass these plaintiffs, nor does the evidence disclose a course of conduct that may fairly be characterized as so outrageous in character ... as to go beyond all possible bounds of decency...." *Id.* (internal quotation marks omitted).

We affirm the district court's dismissal of the plaintiffs' IIED claims because, like the defendant's conduct in *Roberts,* the plaintiffs' allegations of defendants' fraudulent denial of worker's compensation benefits are not "so outrageous in character ... as to go beyond all possible bounds of decency." *Id.* Decisions of the Michigan Court of Appeals confirm this conclusion. That court has explained that the "wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." *Atkinson* v. *Farley,* 171 Mich. App. 784, 431 N.W.2d 95, 97 (Mich. Ct. App. 1988). Even the wrongful denial of worker's compensation benefits "to further some ulterior motive of the defendants," as the plaintiffs here allege, is insufficiently outrageous to support an IIED claim under Michigan law. *Lisecki* v. *Taco Bell Rests., Inc.,* 150 Mich. App. 749, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986); *accord Hajciar* v. *Crawford & Co.,* 142 Mich. App. 632, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985).[7] For these reasons, dismissal of the plaintiffs' IIED claims was proper.

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[7] In the district court, Cassens argued that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, preempted plaintiffs' IIED claims. The district court did not address this argument because it dismissed the IIED claims under Rule 12(b)(6). The district court likely should have addressed the preemption question first because in cases of LMRA preemption, the court must "recharacterize" the state cause of action as a federal claim and analyze the claim under federal law. 14B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1 (3d ed. 1998). However, the defendants do not raise LMRA preemption on appeal, and thus we simply review the district court's decision to dismiss for failure to state a claim.

VII. CONCLUSION

We REVERSE the dismissal of plaintiffs' RICO claims because their RICO claims are not preempted by state law and because plaintiffs have adequately pleaded a pattern of racketeering activity despite the lack of reliance on the defendants' fraudulent acts and REMAND to the district court for further proceedings consistent with this opinion. We AFFIRM the dismissal of the IIED claims because the defendants' alleged conduct cannot meet Michigan's standard for outrageous conduct.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

United States District Court for the Eastern District of Michigan

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Plaintiffs,

v.

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, FOREIGN CORPORATIONS, AND DR. SAUL MARGULES,

Defendants.

No. 04-CV-72316

July 15, 2005

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(B)(6)

BORMAN, District Judge.

Now before the Court are Defendants' motions to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). The Court heard oral argument on March 10, 2005. Having considered the entire record, and for the reasons that follow, the Court:

1) DISMISSES Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18

U.S.C. § 1961, *et seq.*, because they fail to state claims for which relief may be granted, and because Michigan's Workers' Disability Compensation Act, M.C.L. 418.101, *et seq.*, reverse-preempts those claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b); and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

I. PROCEDURAL BACKGROUND

At all times relevant to the instant action, Paul Brown ("Brown"), William Fanaly ("Fanaly"), Charles Thomas ("Thomas"), Gary Riggs ("Riggs"), Robert Orlikowski ("Orlikowski"), and Scott Way ("Way") (collectively "Plaintiffs") were employees of Cassens Transport Company ("Cassens"). (Compl. at ¶ 4.) Crawford & Company ("Crawford") adjusted workers-compensation claims of Cassens' employees on Cassens' behalf. (*Id.*) Dr. Saul Margules ("Margules") examined certain Plaintiffs concerning their entitlements to workers' compensation benefits. (*Id.* at ¶ 6B.)

On June 22, 2004, Plaintiffs filed suit against Cassens, Crawford, and Margules (collectively "Defendants"), alleging that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits in violation of the Racketeer Influenced and Corrupt Organizations Act ("the RICO Act"), 18 U.S.C. § 1961, *et seq.*, and alleging that Defendants subjected each Plaintiff to the intentional infliction of emotional distress in violation of Michigan law. (*Id.* at ¶¶ 1-77.) Plaintiffs' complaint, in essence, alleges that Defendants conspired

to deny each Plaintiff's workers' compensation claim even though they were aware of facts that would support the validity of each of those claims.

On August 23, 2004, Crawford filed the instant motion to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). In that motion, Crawford argues that: 1) the McCarran-Ferguson Act, 15 U.S.C. § 1012, *et seq.*, preempts Plaintiffs' RICO claims; and 2) Plaintiffs' intentional-infliction-of-emotional-distress ("IIED") claims fail as a matter of law because Michigan does not recognize causes of action for the mere tortious refusal to pay workers' compensation benefits. (Crawford Mot. at 2.) Cassens and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

On September 7, 2004, Cassens filed the instant motion to dismiss Plaintiffs' complaint under Rule 12(b)(6). Along with raising the same two claims that Crawford raises in its motion to dismiss, Cassens' motion contends that: 1) the primary-jurisdiction doctrine bars Plaintiffs' complaint; 2) the Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141, *et seq.*, preempts Plaintiffs' RICO claims; and 3) Plaintiffs' RICO claims fail to state claims for which relief may be granted. (Cassens Mot. at 2-3.) Crawford and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise as a defense to a claim for relief in a pleading the opposing party's failure to state a claim upon which relief can be granted. Rule 12(b)(6) is de-

signed to test whether, as a matter of law, a plaintiff is entitled to legal relief. *Nishiyama* v. *Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). Before dismissing a complaint for failure to state a claim upon which relief can be granted, a court must conclude "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Carver* v. *Bunch*, 946 F.2d 451, 452 (6th Cir. 1991).

To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid* v. *Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept well-pleaded facts as true. *Columbia Natural Resources Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Thus, a court may not grant a Rule 12(b)(6) motion based upon its disbelief of a complaint's factual allegations. *Id.* A court, however, need not accept as true conclusions of law or unwarranted factual inferences. *Morgan* v. *Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity." *See generally Begala* v. *PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776 (6th Cir. 2000) (holding that pleadings under the RICO Act are to be liberally construed).

Federal Rule of Civil Procedure 12(b) provides:

> If, on a motion asserting the defense ... [of] failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A. RICO CLAIMS

The Court will proceed to discuss the following issues related to Plaintiffs' RICO claims:

1) whether the primary-jurisdiction doctrine mandates a stay of Plaintiffs' RICO claims;

2) whether the *Burford* doctrine mandates a stay of Plaintiffs' RICO claims;

3) whether the complaint pleads predicate acts of witness tampering;

4) whether the complaint pleads predicate acts of mail or wire fraud with the necessary particularity;

5) whether the complaint pleads the requisite detrimental reliance;

6) whether the McCarran-Ferguson Act reverse-preempts Plaintiffs' RICO claims; and

7) whether the Labor Management Relations Act preempts Plaintiffs' RICO claims.

1. Primary-Jurisdiction Doctrine

In its motion to dismiss, Cassens contends that the doctrine of primary jurisdiction applies to Plaintiffs' RICO claims. (Cassens Br. at 20.) According to Cassens, all of the Plaintiffs except Fanaly have

claims for workers' compensation benefits that are pending before the Workers Disability Compensation Bureau ("the WDCB"). (Reply at 5.)

The primary-jurisdiction doctrine's aim is to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956). Specifying when the doctrine of primary jurisdiction is applicable, the Supreme Court has held:

> .... "Primary jurisdiction" applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of a claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case[,] a judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64, 77 S. Ct. 161. Thus, the primary-jurisdiction doctrine applies where: 1) the Court has original jurisdiction over the claim before it; 2) the adjudication of that claim requires the resolution of certain underlying issues; and 3) a regulatory scheme commits the resolution of those issues to an administrative agency's special competence. In deciding whether the primary-jurisdiction doctrine applies in any given case, the court must determine whether the application of that doctrine in the particular case would serve the following twin rationales underlying that doctrine: 1) uniformity in questions of an administrative nature; and 2) the expert and specialized knowledge of the relevant agency to the issue in question. *Id.* at 64, 77 S. Ct. 161.

The threshold requirements for the applicability of the primary-jurisdiction doctrine are met here. First, the Court clearly has jurisdiction over Plaintiffs' RICO claims as they arise under federal law. Second, the adjudication of Plaintiffs' RICO claims-i.e. that Defendants engaged in a RICO enterprise fraudulently to deny Plaintiffs' workers' compensation benefits-hinges, in part, upon whether Plaintiffs are entitled to those benefits in the first instance. (Cassens Br at 20; Resp. Cassens at 17.) Lastly, a regulatory scheme of the Michigan legislature, the Workers' Disability Compensation Act ("the WDCA"), commits the resolution of an employee's entitlement to workers' compensation benefits to the special competence of the WDCB. (Cassens Br. at 20.) Specifically, the WDCA, M.C.L. 418.841(1), provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.

The primary-jurisdiction doctrine's twin rationales are also met here. Given the complicated medical issues underlying Plaintiffs' entitlement to workers' compensation benefits, the WDCB, rather than the Court, possesses the necessary expertise and the specialized knowledge properly to resolve those underlying issues and, thus, the ultimate issues of Plaintiffs' entitlement to benefits. Deferring to the WDCB's determination of a plaintiff's entitlement to workers' compensation benefits in cases such as this would promote uniformity in such determinations. Thus, a consideration of the relevant factors counsels in favor of applying the primary-jurisdiction doctrine

to stay the adjudication of Plaintiffs' RICO claims, if they survive the instant motion.[1]

On the other hand, it is unclear whether the primary-jurisdiction doctrine may apply in favor of a state administrative agency where the claim at issue arises under federal law and there are no competing federal forums. 73 C.J.S. Public Administrative Law and Procedure § 72. The majority of courts that have applied the primary-jurisdiction doctrine have done so in favor of a federal administrative agency.[2] *See*

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[1] While Cassens contends that the application of the primary-jurisdiction doctrine to Plaintiffs' RICO claims would require the dismissal of those claims, such a contention is incorrect. (Cassens Br. at 20-21.) The principal issue underlying the application of that doctrine is simply whether a federal court should postpone the exercise of its jurisdiction in deference to an administrative agency; it does not divest the Court of its subject-matter jurisdiction. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 353, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963).

[2] At least one federal court sitting in diversity jurisdiction has applied the primary-jurisdiction doctrine in favor of a state administrative agency. *See Northwinds Abatement, Inc.* v. *Employers Ins. of Wausau,* 69 F.3d 1304, 1311 (5th Cir. 1995) (holding that, under the doctrine, the district court should have stayed the diversity-jurisdiction case pending the state workers' compensation commission's final decision on whether the defendant properly paid certain workers' compensation claims). It is unclear, however, whether that federal court deferred to the state administrative agency's primary jurisdiction only on the ground that the *Erie* doctrine would compel such deferral. *See* 73 C.J.S. Public Administrative Law and Procedure § 72; *Virginia Imports, Inc.* v. *Kirin Brewery of Am., LLC,* 296 F. Supp. 2d 691, 698, 698 n.1 (E.D. Va. 2003) (holding that, in a diversity-jurisdiction case involving only state claims, the primary-jurisdiction doctrine does not apply in favor of a state agency, as compared to a federal agency, and holding that, even if the doctrine were to apply, a federal district court sitting in diver-

Far East Conference v. *United States,* 342 U.S. 570, 574-75, 72 S. Ct. 492, 96 L. Ed. 576 (1952) (applying the doctrine in favor of the Federal Maritime Board in the context of federal claims); *Western Pac. R.R. Co.*, 352 U.S. at 63-64, 77 S. Ct. 161 (applying the doctrine in favor of the Interstate Commerce Commission in the context of federal claims); *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 631-32, 634 (6th Cir. 1987) (applying the doctrine in favor of the Federal Communications Commission in the context of federal claims).

In *County of Suffolk* v. *Long Island Lighting Co.*, the United States Second Circuit Court of Appeals held that, subject to a narrow exception, the primary-jurisdiction doctrine does not apply in favor of a state administrative agency where there is a federal claim at issue and where there are no competing federal forums. 907 F.2d 1295, 1310 (2d Cir. 1990) (holding that the exception applies where a state administrative agency operates pursuant to a federal legislative scheme). The Second Circuit chiefly reasoned that the "theoretical underpinning of the primary-jurisdiction doctrine ... is the authority [that] *Congress* intended th[e] [administrative] agency to exercise within a particular statutory scheme." *Id.* (emphasis in original); *see Far East Conference,* 342 U.S. at 574-75, 72 S. Ct. 492 (addressing the doctrine in terms of a regulatory scheme that Congress created, and noting that courts and administrative agencies are "means adopted to attain the prescribed end ... through co-ordinated action"). The Second Circuit elaborated that, "[i]n the federal question/federal agency context, the creation of an agency and the

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sity would defer to a state agency's primary jurisdiction only if state courts would so defer).

grant to it of certain adjudicative authority may evince a congressional intent to limit the judiciary's jurisdiction." *County of Suffolk*, 907 F.2d at 1310. As the Court pointed out, "the independent act of a state legislature in creating a particular administrative body ... can shed no light on *Congress'* intent to limit the jurisdiction of the federal courts[.]" *Id.* at 1311. While finding that the agency-expertise rationale underlying the primary-jurisdiction doctrine was implicated in the case, the Court underscored that it is that doctrine's theoretical underpinnings that controls its applicability, "not the functional competence of an agency[.]" *Id.* at 1310.

However, in the subsequent case of *Johnson* v. *Nyack Hospital*, the Second Circuit held that, under the primary-jurisdiction doctrine, the district court should have stayed the plaintiff's federal antitrust claim pending a state administrative agency's determination of the complicated factual issues underlying that claim. 964 F.2d 116, 122-23 (2d Cir. 1992) (noting that, under the distinct doctrine of exhaustion, the issue is whether Congress' statutory intent was to render a federal claim cognizable only in the first instance by an administrative agency, whether state or federal). While recognizing that most cases applying the primary-jurisdiction doctrine did so in favor of a federal administrative agency, the Court reasoned that the application of that doctrine there served the underlying agency-expertise rationale as well as judicial economy. *Id.* The Court neither mentioned nor distinguished *County of Suffolk*. Thus, it is unclear what remains, if anything, of the precedential value of *County of Suffolk*.

As discussed below, the *Burford* doctrine would compel the stay of Plaintiffs' RICO claims pending

the WDCB's determination of Plaintiffs' entitlements to workers' compensation benefits.

2. *Burford* Abstention Doctrine

The *Burford* abstention doctrine takes its name from the Supreme Court's decision in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). In *Rouse* v. *DaimlerChrysler Corporation,* the United States Court of Appeals for the Sixth Circuit underscored that the aim of the *Burford* doctrine is to "avoid conflict with a state's administration of its own affairs." 300 F.3d 711, 716 (6th Cir. 2002). The Sixth Circuit held that, therefore, the *Burford* doctrine "applies only if a federal court's decision on a state law issue is likely to 'interfere with the proceedings or orders of state administrative agencies.' " *Id.* The Sixth Circuit further held:

> The *Burford* abstention [doctrine] should not be applied unless: (1) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or (2) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Id. (internal quotation marks omitted); *see Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 727, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) (implicitly recognizing that the *Burford* doctrine may apply where the case involves either a "state-law claim" or "an assertion that the federal claims [were] ... entangled in a skein of state law that must be entangled before the federal case can proceed") (internal quotation marks

omitted). Since *Burford*, the Supreme Court has held that a federal court may dismiss or remand a complaint "based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. at 731, 116 S. Ct. 1712 (illustrating such equitable or discretionary relief with suits for injunctive relief or certain classes of declaratory judgments). However, the Court noted that, in actions "at law" or for damages, it has only permitted federal courts, based on abstention principles, to "enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether." *Id.* at 719, 116 S. Ct. 1712.

Cassens contends that the Court should apply the *Burford* doctrine to Plaintiffs' RICO claims so that the WDCB may determine Plaintiffs' entitlement to workers' compensation benefits in the first instance.[3] (Cassens Reply at 5.) Plaintiffs, in response, maintain that Cassens has failed to present any meaningful argumentation on the applicability of the *Burford* doctrine to Plaintiffs' RICO claim. (Resp. at 19.) Yet, since the *Burford* doctrine implicates important issues of comity.

Contrary to Plaintiffs' contention, the determination of their entitlement to workers' compensation benefits in this federal forum would likely frustrate or undermine Michigan's workers' compensation scheme, as set forth in the WDCA. (*See* Resp. Cas-

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[3] While Cassens contends that the application of the *Burford* doctrine to Plaintiffs' RICO claims requires the Court to dismiss those claims, *Quackenbush* forecloses any such contention. (Reply at 5.) Rather, at issue is whether the Court should stay Plaintiffs' RICO claims pending the WDCB's determination of Plaintiffs' entitlement to workers' compensation benefits.

sens at 19.) That administrative scheme is comprehensive, setting forth the nature and amount of the particular benefits to which it affords entitlement, the scope of any such entitlement, and the administrative and judicial processes for resolving any disputes regarding that entitlement. The determinations of Plaintiffs' entitlement to workers' compensation benefits often hinge upon complex medical issues. Given the expertise and specialized knowledge necessary to resolve such underlying issues properly, the determination of Plaintiffs' entitlement to workers' compensation benefits in this federal forum may result in adjudications that would be contrary to those of the WDCB. Indeed, the frequent resolution, in a federal forum, of a plaintiff's entitlement to workers' compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCB.

Contrary to Plaintiffs' assertion, an employee's entitlement to workers' compensation benefits bears upon "policy problems of a substantial public import" or "matter[s] of substantial public concern." *See Rouse*, 300 F.3d at 716. (*See* Resp. to Cassens at 19.) As the Michigan Supreme Court has declared:

> The primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers. An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability be-

> cause the ... [WDCA], under M.C.L. § 418.131(1)..., provides that this compensation is the exclusive remedy for a personal injury, except for an injury resulting from intentional tort. Thus, ... [the WDCA's] purpose is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Simkins v. *General Motors Corp.*, 453 Mich. 703, 710, 556 N.W.2d 839 (Mich. 1996). Thus, an employee's entitlement to workers' compensation benefits bears upon Michigan's significant interest in safeguarding the policy balance that the legislature struck in the WDCA by ensuring employees' speedy and no-fault recovery of guaranteed compensation for work-related injuries and by shielding employers, in exchange for providing their employees with such compensation, from liability beyond that which the WDCA permits. Moreover, both Michigan's employers and their employees have substantial interests in gaining their respective benefits from that regulatory balance. In determining an employee's entitlement to workers' compensation, a federal forum may not be as adept at navigating that policy balance as the WDCB, to which the Michigan Legislature entrusted that task in the first instance. Furthermore, the improper denial of an employee's entitlement to workers' compensation benefits for a work-related disability would be of great public important were that employee, consequently, to become a ward of the state.

Comparatively-speaking, in contrast to its substantial interest in resolving the federal-law issues of Plaintiffs' RICO claims, this federal forum would have a minimal interest in determining Plaintiffs'

entitlement to workers' compensation benefits. The Court would, therefore, stay Plaintiffs' RICO claims based on their alleged entitlement to workers' compensation benefits, if they survived the instant motions, pending a final determination of Plaintiffs' entitlement to those benefits via Michigan's workers' compensation scheme.

3. RICO Claims

The RICO Act, 18 U.S.C. § 1961, *et seq.*, affords a civil remedy when an individual is "injured in his business or property" by virtue of a violation of § 1962 of the Act. *See* 18 U.S.C. § 1964(c) (providing that the person may "recover threefold the damages [that] he sustains and the cost of the suit, including a reasonable attorney's fee"). Section 1962(c) of the RICO Act provides, in part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...

18 U.S.C. § 1962(c).

The RICO claims that Plaintiffs' complaint sets forth solely arise under § 1962(c). In the instant motions to dismiss, Defendants contend that Plaintiffs' complaint, however, fails to plead claims under § 1962(c) for which relief may be granted.

The elements of a viable cause of action under 18 U.S.C. § 1962(c) are: 1) the conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Central Distributors of Beer, Inc.* v. *Conn*, 5 F.3d 181 (6th Cir. 1993) (quoting *Sedima* v. *Imrex*, 473 U.S.

479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)). Section 1961(1)(B) of the RICO Act defines the requisite "racketeering activity" to include, as a predicate act, "any act which is indictable under any of the following provisions of title 18, United States Code...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), ... [and] section 1512 (relating to tampering with a witness, victim, or an informant)[.]" 18 U.S.C. § 1961(1)(B). Section 1961(5) of the RICO Act mandates that the requisite "pattern of racketeering activity" include at least two acts of such activity, which must have occurred within a ten-year period. 18 U.S.C. § 1961(5).

a. Witness Tampering

Cassens, for the first time in reply, asserts that Plaintiffs' complaint fails sufficiently to plead a predicate act of witness tampering under 18 U.S.C. § 1512. (Reply at 4.) Plaintiffs' complaint, per paragraphs 12, 16A, 32, and 34A, alleges that each Defendant twice violated § 1512 when, on two occasions, the corporate Defendants "expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports for Plaintiffs Fanaly and Brown regardless of their actual entitlement to workers' compensation benefits and when Margules opined to the other Defendants that Plaintiffs had no job-related disabilities. (Compl. at ¶¶ 12, 16A, 32, 34A.)

These allegations, however, are insufficient to survive a motion to dismiss. Plaintiffs' complaint fails to explain how Defendants' actions violated § 1512. Indeed, Plaintiffs acknowledged the tenuous and specious nature of such predicate acts at oral argument. Accordingly, the Court dismisses Plaintiffs'

RICO claims to the extent that they rely upon predicate acts under 18 U.S.C. § 1512.

b. Mail and/or Wire Fraud

A plaintiff must prove each element of the predicate act or "racketeering activity" for a civil action under the RICO Act to lie. *Central Distributors of Beer, Inc.* v. *Conn,* 5 F.3d 181, 183-84 (6th Cir. 1993). "To allege a violation of the mail fraud statute, it is necessary to show that: 1) the defendants formed a scheme or artifice to defraud; 2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and 3) the defendants did so with the specific intent to deceive or to defraud." *Id.* at 184 (citing *Schreiber Distributing* v. *Serv-Well Furniture,* 806 F.2d 1393, 1399 (9th Cir. 1988)). Similarly, to allege a violation of the wire fraud statute, it is necessary to show: 1) "the formation of a scheme or artifice to defraud; 2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and 3) [the] specific intent to deceive or to defraud." *Id.* (citing *Schreiber,* 806 F.2d at 1400).

Federal Rule of Civil Procedure 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Where a plaintiff relies upon mail or wire fraud to constitute a predicate act under RICO, Rule 9(b) requires that he must allege, at a minimum, the time, place, and contents of the fraudulent communications. *Bender* v. *Southland Corp.,* 749 F.2d 1205, 1216 (6th Cir. 1984).

(1) Requisite Particularity

In its motion to dismiss, Cassens contends that Plaintiffs' complaint fails, as a matter of law, to plead the predicate acts of wire or mail fraud underlying their RICO claims with the particularity that Rule 9(b) requires. (Cassens Br. at 16.) In particular, Cassens asserts that Plaintiffs' complaint fails to plead with particularity the time, place, or content of the communications underlying the alleged predicate acts of mail or wire fraud. (Cassens Br. at 17.) Plaintiffs, in response, assert that their complaint pleads the mail and wire communications with the necessary particularity. (Resp. Cassens at 10).

As to Plaintiff Fanaly's RICO claims, the complaint pleads with the requisite particularity two predicate acts of mail fraud, per paragraphs 9 and 14, and one predicate act of wire fraud, per paragraph 8. Paragraphs 12 and 16A plead additional claims of mail and wire fraud in that they allege, respectively, that "Defendants expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports regardless of the true circumstances, and that "Margules opined to the other [D]efendants that [P]laintiff had no job-related disability." (Compl. at ¶¶ 12, 16A.) Paragraphs 12 and 16A further plead that these communications were "by mail and wire and are not in the possession of [P]laintiff but are in the possession of [D]efendants," and that these allegations are "based in part upon information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." (*Id.*) Paragraphs 12 and 16A fail to plead the time and place of such communications.

Plaintiffs contend that, where, as here, their complaint expressly invokes Federal Rule of Civil Procedure 11(b)(3), which allows pleading based on "evidence reasonably anticipated after further investigation or discovery," the Court should relax the particularity-requirement of Rule 9(b). (Resp. Cassens at 11.) In *Rotella v. Wood*, the Supreme Court affirmed that Rule 11(b)(3) provides some "flexibility" concerning Rule 9(b)'s particularity requirement. 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (citing *Corley* v. *Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998), in which the court relaxed Rule 9(b)'s particularity requirements where the RICO plaintiff lacked access to all facts necessary to detail his claim). On the other hand, while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation. The Court strikes from the complaint the predicate acts alleged in paragraphs 12 and 16A. However, Fanaly's RICO claims, per paragraphs 8, 9, and 14, plead with the requisite particularity at least two predicate acts of mail and/or wire fraud.[4]

As to Plaintiff Thomas' RICO claims, the complaint pleads with the necessary particularity only one predicate act, mail fraud per paragraph 23. However, paragraph 24 fails properly to plead another predicate act. Rather, paragraph 24 simply alleges that "Defendants also committed mail fraud in that their pleadings in the workers' compensation

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[4] Nevertheless, Fanaly's RICO claims based upon the predicate acts in paragraphs 8, 9, and 14—along with the predicate act in paragraph 12—fail to state claims for which relief may be granted, as discussed below.

case fraudulently denied that [P]laintiff suffered a work-related injury when they had knowledge that [P]laintiff had suffered" such an injury. (Compl. at ¶ 24.) Paragraph 24, which neither invokes Rule 11(b)(3) nor would have any reason to do so, fails to allege with the necessary particularity the time or the place of that communication. Because Thomas' RICO claims only sufficiently plead one predicate act, they fail, as a matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[5] *See* 18 U.S.C. § 1961(5).

As to Plaintiff Brown's RICO claims, the complaint pleads with the necessary particularity three predicate acts of mail fraud, per paragraphs 35 and 41A, and three predicate acts of wire fraud, per paragraphs 41 and 41A. Paragraphs 32 and 34 allege, respectively, that Defendants "expressly or implied[ly] communicated" to Margules via mail and wire that they wanted him to write false cut-off reports, and that Margules opined to Defendants via mail and wire that Brown had no job-related disability; both paragraphs expressly invoke Rule 11(b)(3). For the same reasons stated above, the Court finds that paragraphs 32 and 34 do not plead predicate acts of mail and wire fraud with the requisite particularity to survive the instant motions to dismiss. However, Brown's RICO claims, per paragraphs 35,

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[5] Moreover, even if paragraph 24 alleges a predicate act of mail fraud with the necessary particularity, Thomas' RICO claims would still fail to state claims for which relief may be granted based upon the predicate act in paragraph 23, as addressed below.

41, and 41A, plead with the requisite particularity at least two predicate acts of mail and/or wire fraud.[6]

As to Plaintiff Riggs' RICO claims, the complaint pleads only one predicate act—mail fraud per paragraph 48—although it does so with the requisite particularity.[7] Because Riggs' RICO claims fail to plead at least two predicate acts, they fail, as a matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[8] *See* 18 U.S.C. § 1961(5).

As to Plaintiff Orlikowski's RICO claims, the complaint pleads a predicate act of mail fraud, per paragraph 58, with the requisite particularity. Paragraph 57 pleads another predicate act of mail and/or wire fraud based upon Margules' transmission of his allegedly-fraudulent medical report to Defendants. While paragraph 57, which does not invoke Rule 11(b)(3), pleads the time and content of the communication, it fails to specify the means of the communication. Even if paragraph 57 were to plead a predicate act of mail or wire fraud with the requisite particularity, Orlikowski's RICO claims based upon such a predicate act—along with the predicate act in

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[6] In any event, as discussed below, Brown's RICO claims based upon the predicate acts in paragraphs 35, 41, and 41A—along with those in paragraphs 32 and 34—fail to state claims for which relief may be granted.

[7] Moreover, as discussed below, Riggs' RICO claims based upon the predicate act in paragraph 48 would fail to state claims for which relief may be granted for another reason.

[8] Moreover, Riggs' RICO claims based upon the predicate act of mail fraud in paragraph 48 fail to state claims for which relief may be granted for another reason, as addressed below.

paragraph 58—would, nevertheless, fail as a matter of law, as discussed below.

Lastly, as to Plaintiff Way's RICO claims, the complaint pleads with the necessary particularity at least two predicate acts of mail fraud, per paragraphs 68 and 69.[9]

The Court, therefore, dismisses the RICO claims of Plaintiffs Thomas and Riggs for failure to plead the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted. *See* 18 U.S.C. § 1961(5).

c. Detrimental Reliance

In its motion to dismiss, Cassens contends that Plaintiffs must either plead detrimental reliance as an element of each predicate act of mail or wire fraud underlying their RICO claims or as part of the causation element of those claims, and that Plaintiffs' complaint has failed to do so. (Cassens Br. at 17, 19; Reply at 4.) Plaintiffs, in response, assert otherwise. (Resp. at 15)

In *Blount Financial Services, Inc.* v. *Walter E. Heller & Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit held that a civil RICO complaint involving a predicate act of mail fraud must allege "with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact" to establish the "scheme to defraud" element of mail fraud. *Accord Bender*, 749

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[9] However, Way's RICO claims based upon the predicate acts in paragraphs 68 and 69 fail to state claims for which relief may be granted, as discussed below.

F.2d at 1216; *Central Distributors*, 5 F.3d at 184. The Sixth Circuit continues to espouse this holding.[10]

While a plaintiff need not plead detrimental reliance as an element of each predicate act of mail or wire fraud underlying his RICO claims, the Sixth Circuit, in *Chaz Construction, L.L.C.* v. *Codell*, recently opined that "*Central Distributors* [v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993),] held that a showing of reliance is required to establish standing in civil RICO cases" and that this "holding ... is not in conflict with the Supreme Court's decision in *Neder* [v. *United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999),] or th[e] ... [Sixth Circuit's] decision in [*United States* v.] *Daniel*, [329 F.3d 480 (6th Cir. 2003)]." 137 Fed. Appx. 735 (6th Cir. 2005) (unpublished opinion). In *Chaz Construction*, the Sixth Circuit recognized that, per *Neder*, the common-law requirement of justifiable reliance has no place in the federal fraud statutes-to wit, that reliance is not an

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[10] *See VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (holding, in a civil RICO case based upon predicate acts of mail and wire fraud, that the plaintiff must plead "a material misrepresentation of fact that was calculated or intended to deceive persons of reasonable prudence and comprehension," and that the plaintiff "relied upon that material misrepresentation" to establish the fraud statutes' requisite "scheme to defraud"); *Armbruster* v. *K-H Corporation*, 206 F. Supp. 2d 870, 898 (E.D. Mich 2002) (relying upon *Blount*, 819 F.2d at 152, and *Bender*, 749 F.2d at 1215, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's misrepresentation); *Paycom Billing Services, Inc.* v. *Payment Resources Int'l*, 212 F. Supp. 2d 732, 736 (W.D. Mich. 2002) (relying upon *VanDenBroeck*, 210 F.3d at 701, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's material misrepresentation).

element of mail or wire fraud. *Id.* Underscoring that criminal prosecutions, unlike civil actions, under RICO do not require standing, *Chaz Construction* reasoned that, "[t]herefore, the holding in *Central Distributors* that plaintiffs must plead reliance in order to establish standing in a civil RICO case does not conflict with the holdings in *Neder* and *Daniel....*" *Id.*

Plaintiffs assert that their complaint sufficiently pleads that Plaintiffs detrimentally relied upon the allegedly fraudulent communications underlying the alleged predicate acts, if such detrimental reliance were required. (Resp. Cassens at 17.) Specifically, Plaintiffs' complaint asserts that they relied upon such communications by "suffer[ing] the financial loss of having to pay attorney fees, medical care, and medical mileage." (Compl. at ¶¶ 17, 25, 38, 42, 50, 61, 70.)

As Defendants aptly note, Plaintiffs argue, in essence, that they relied upon the alleged fraudulent communications by challenging and disclaiming the truthfulness or validity of the content of those communications, rather than by assuming the truthfulness or validity of such content and by taking actions based upon that assumption to their detriment. (Cassens Br. at 19.) Yet, the plaintiff must detrimentally rely upon the alleged fraudulent communications by virtue of being "deceived by" them. *See Grantham and Mann, Inc.* v. *American Safety Products., Inc.*, 831 F.2d 596, 606 (6th Cir. 1987). Here, most of the predicate acts of mail and/or wire fraud in Plaintiffs' complaint surround Notices of Dispute or other communications to Plaintiffs setting forth the reason for Defendants' denial of Plaintiffs' workers' compensation benefits, per paragraphs 8, 9, 14,

23, 35, 48, 58, 69, or communications to a particular Plaintiff regarding Defendants' refusal to pay Plaintiff's medical bills pending a workers' compensation appeal or Defendants' assertion that they mistakenly believed that they were not obligated to do so, per paragraph 41 and 41A. However, instead of detrimentally relying upon those communications by virtue of being deceived by their content, Plaintiffs, as their complaint acknowledges, challenged the validity of that content in the first instance. Thus, Plaintiffs' injury arose, not from their reliance upon such fraudulent communications, but, rather, from Defendants' denial of Plaintiffs' workers' compensation benefits. *See Grantham,* 831 F.2d at 606. Moreover, a plaintiff cannot detrimentally rely upon any alleged fraudulent communications that were not directed to him. *Cf. Central Distributors of Beer, Inc.* v. *Conn,* 5 F.3d 181 (6th Cir. 1993). Here, paragraphs 12, 16A, 32, 34, 41, 57, and 68 allege fraudulent communications by Defendants that were not directed at any Plaintiff.

Thus, by failing to plead the key requirement of detrimental reliance, Plaintiffs' RICO claims based upon the predicate acts in paragraphs 8, 9, 12, 14, 23, 32, 34, 35, 41, 41A, 48, 57, 58, 68, and 69 fail to state claims for which relief may be granted. Because Fanaly's RICO claims, which are based upon predicate acts in paragraphs 8, 9, 12, 14, and 16A, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5). Since Brown's RICO claims, which are based upon predicate acts in paragraphs 32, 34, 35, 41, and 41A, fail to plead at least two predicate acts upon which such claims may be granted, they fail to plead the necessary "pattern of

racketeering activity" as a matter of law. Because Orlikowski's RICO claims, which are based upon predicate acts in paragraphs 57 and 58, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." Lastly, since Way's RICO claims, which are based upon predicate acts in paragraphs 68 and 69, fail to plead at least two predicate acts upon which such claims may be granted, they fail, as a matter of law, to plead the necessary "pattern of racketeering activity." In sum, Plaintiffs' RICO claims fail to state claims for which relief may be granted. The Court, therefore, dismisses all of the Plaintiffs' RICO claims.

4. McCarran-Ferguson Preemption

Crawford argues that, under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the WDCA, M.C.L. 418.101, *et seq.*, reverse-preempts Plaintiffs' RICO claims, which allege that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits. (Crawford Br. at 2.) Plaintiffs, in turn, maintain that the McCarran-Ferguson Act does not preempt their RICO claims.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such acts specifically relate to the business of insurance.

The McCarran-Ferguson Act's aim is to establish "a form of inverse preemption, letting state law prevail over general federal rules-those that do not 'specifically relate to the business of insurance.'" *Nationwide Mutual Ins. Co.* v. *Cisneros,* 52 F.3d 1351, 1360 (6th Cir. 1995) (internal quotation marks omitted). However, under the Act, "when Congress enacts a law specifically relating to the business of insurance, that law controls." *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 306, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). To recap, the McCarran-Ferguson Act precludes the application of a federal statute: 1) that does not "specifically relate to the business of insurance"; 2) in the face of state law "enacted ... for the purpose of regulating the business of insurance"; and 3) where the federal statute would "invalidate, impair, or supersede" the state insurance law. *Id.* at 307, 119 S. Ct. 710.

As to the first prerequisite, the RICO Act is not a federal statute that "specifically relate[s] to the business of insurance." *Humana,* 525 U.S. at 307, 119 S. Ct. 710. Thus, the first prerequisite to reverse-preemption under the Act is met here.

As to the second prerequisite, a state law is "enacted ... for the purpose of regulating the business of insurance" where: 1) it has the "effect of transferring or spreading the policyholder's risk"; 2) it is an "integral part of [the] policy relationships between [the] insurer and [the] insured"; and 3) it is "limited to entities within the insurance industry." *Medical Mut. of Ohio* v. *deSoto,* 245 F.3d 561, 574 (6th Cir. 2001). The Court recognizes that whether Michigan enacted the WDCA "for the purpose of regulating the business of insurance" is, indeed, a thorny issue. The

Court concludes, however, that the WDCA does, in fact, regulate the business of insurance.

First, the Court finds that the WDCA transfers or spreads a risk that is characteristic of insurance. *See Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). As the Michigan Supreme Court has opined, "[t]he primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers." *Simkins,* 453 Mich. at 710, 556 N.W.2d 839.

Second, the Court finds that the WDCA is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *deSoto,* 245 F.3d at 574. The WDCA requires all Michigan employers to provide workers' compensation benefits to their employees, either by self-insuring or by purchasing insurance from a duly-authorized insurance company. If one were to define the employee as the insured and the self-insured employer as the insurer, then the WDCA would, indeed, be an integral part of the policy relationship between the employee and employer, so defined. If one were to define the non-self-insured employer and the employer's insurer or the employee and the employer's insurer as the insured and insurer, respectively, then the WDCA would still be an integral part of the policy relationship between those entities and individuals in that the employer and its insurer have, in essence, contractually agreed to have the insurer fulfill the employer's obligations to its employees under the WDCA.

Lastly, the Court concludes that the WDCA is "limited to entities within the insurance industry." Plaintiffs, in essence, maintain that the WDCA is not

limited to such entities because it reaches self-insured employers and claims' adjusters, like Cassens and Crawford, respectively, and is not limited to insurance companies. (Resp. to Crawford at 1; Resp. to Cassens at 6.) However, as Crawford points out, adjusters of insurance claims are entities within the insurance industry. *See Pireno,* 458 U.S. at 134 n.8, 102 S. Ct. 3002. By electing to self-insure its obligation to provide workers' compensation benefits to its employees, pursuant to the WDCA's strict requirements, the employer, in effect, stands in the stead of an insurance company. The WDCA does not include entities outside of the insurance industry simply because it reaches employees, whom one could characterize as either the insured or the beneficiaries of the insurance. Similarly, the WDCA does not include entities outside of the insurance industry simply because it reaches employers who elect to purchase insurance from an insurance company rather than to self-insure, which employers one could, then, characterize as the insured.

The Court notes that the Michigan Legislature did not expressly associate the WDCA with the regulation of insurance. *See Biondo* v. *Life Ins. Co. of North Am.,* 116 F. Supp. 2d 872, 883 (E.D. Mich. 2000). Rather, as Plaintiffs aptly note, Michigan Complied Laws place the WDCA in Chapter 418 dealing with labor rather than in Chapter 500 in the Insurance Code, and the Michigan's Department of Consumer and Industry Services, rather than the Michigan Insurance Bureau, regulates and has jurisdiction over the WDCA's administrative scheme. (Resp. to Crawford at 2-3; Supplemental Br. at 2.) However, the Court finds that this consideration, while relevant, is insufficient in itself to compel a finding that the WDCA does not regulate the busi-

ness of insurance. Similarly, Plaintiffs' attempt to characterize the provision of workers' compensation benefits as not comprising insurance is unpersuasive. (Resp. to Crawford at 1.) Rather, the term "insurance" denotes "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." BLACK'S LAW DICTIONARY 802 (6th ed. 1990). The WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them. The scope of that bargain—to "compensate ... for the loss on a specified subject by specified perils" or to compensate for work-related injuries here—remains unchanged.

As to the last prerequisite, the Court concludes that the RICO Act would impair the WDCA here. As the Supreme Court held in *Humana Inc.* v. *Forsyth*, when the federal statute does not "directly conflict" with the state law and "when application of the federal law would not frustrate any declared state policy or interfere with a [s]tate's administrative regime," the federal law does not "invalidate, impair, or supersede" the state law. 525 U.S. at 310, 119 S. Ct. 710. According to the Supreme Court, the term "invalidate" denotes "to render ineffective, generally without providing a replacement rule or law," and the term "supersede" denotes "to displace (and thus render ineffective) while providing a substitute rule." *Id.* at 308, 119 S. Ct. 710 (internal quotation marks omitted) (finding that the RICO Act would neither invalidate nor supersede Nevada insurance-fraud law).

The RICO Act and the WDCA do not directly conflict. Rather, one could comply with both the RICO

Act and the WDCA. Moreover, the termination of workers' compensation benefits to which the employee is entitled would be actionable under the WDCA and, where part of a fraudulent RICO enterprise, would be actionable under the RICO Act as well. In other words, the RICO Act would not proscribe conduct—i.e. the termination of workers' compensation benefits to which the employee is entitled-that the WDCA would permit or prescribe. Consequently, the application of the RICO Act in this case would neither "render ineffective" nor "displace" the WDCA or any claim under that Act. Thus, applying the RICO Act here would neither invalidate nor supersede the WDCA.

Rather, at issue is whether applying the RICO Act to this case would "impair" the WDCA. The Supreme Court held that the term "impair" denotes "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Humana,* 525 U.S. at 309-10, 119 S. Ct. 710 (internal quotation marks omitted). Moreover, as the Court noted, a federal law "impairs" a state law where it "frustate[s] any declared state policy or interfere[s] with a [s]tate's administrative regime." *Id.* at 310, 119 S. Ct. 710.

Analyzing *Humana* for the first time in reply, Crawford asserts that the application of the RICO Act in the instant case would "impair" the WDCA because the RICO Act, in affording treble damages and a private right of action, provides Plaintiffs greater recourse than that which the WDCA provides. (Crawford Reply at 2-3, Br. at 5; *See* Cassens Br. at 16.) In *Humana,* the Supreme Court addressed the issue of whether the RICO Act impairs Nevada insurance-law by providing materially-different reme-

dies than that state law for purposes of the McCarran-Ferguson Act. 525 U.S. at 305, 119 S. Ct. 710. The court held that, although the RICO Act authorizes treble damages while Nevada's insurance-fraud law permits recovery of only compensatory and punitive damages, applying the RICO Act in that case would not impair the state law but, rather, would complement its remedial scheme. *Id.* at 313, 119 S. Ct. 710. Specifically, the Court noted that, based upon Nevada law's bad-faith exception to its punitive-damages cap, a plaintiff may be eligible under state law for damages exceeding those under the RICO Act. *Id.* at 313, 119 S. Ct. 710.

Here, Plaintiffs would not be eligible to receive damages equal to or exceeding those available under the RICO Act by virtue of an exception to the exclusive remedies that the WDCA provides. *See* M.C.L.A. 418.131. As discussed below, Plaintiffs' claims of intentional infliction of emotional distress surrounding Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits under Michigan law fail to state claims for which relief may be granted.

As the Court previously noted, the purpose of the WDCA "is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Simkins,* 453 Mich. at 710, 556 N.W.2d 839. Thus, applying the RICO Act here to Plaintiffs' claims that Defendants fraudulently denied Plaintiffs' workers' compensation benefits so as to render Plaintiffs eligible for damages beyond those which the WDCA permits would turn on its head the policy balance that the Michigan legislature struck in the WDCA. Indeed, employees would still receive the speedy and no-fault recovery of

guaranteed compensation for work-related injuries under the WDCA, thereby reaping their respective benefits from that legislative balance. However, imposing liability under the RICO Act upon employers beyond that which the WDCA permits robs those employers of the benefits that they are to receive from the WDCA's policy balance.[11] To impose liability under the RICO Act upon employers' insurers of workers' compensation benefits or the claims' adjusters of those insurers, rather than the employers themselves, would still undermine the WDCA's policy balance in that any such liability would ultimately be passed on to the employers in the form of higher premiums. Thus, the Court concludes that the WDCA reverse-preempts Plaintiffs' RICO claims pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Court, therefore, DISMISSES Plaintiffs' RICO claims on this alternate ground.

5. LMRA Preemption

The Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141 *et seq.*, governs the interpretation of collective bargaining agreements ("CBAs"). Section 301, which provides a federal cause of action for a breach of a CBA, states in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting com-

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[11] Plaintiffs argue that applying the RICO Act would encourage employers to pay valid claims rather than to deny them fraudulently and, thus, would promote the WDCA's aim of ensuring employees' quick recovery of benefits. (Resp. at 4.) However, this argument ignores the other half of the bargain that the WDCA struck.

> merce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). "[S]ection 301 not only confers federal jurisdiction over controversies involving ... [CBAs], but also authorizes the federal courts to fashion a body of federal law for the enforcement of section 301." *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d 1033, 1036 (6th Cir. 1989). Moreover, to develop a uniform body of national labor law and "to avoid conflicts in the interpretation of collective bargaining agreements," the federal law governing § 301 preempts state law. *Id.* Pursuant to this preemption doctrine, § 301 governs claims that directly rely upon rights that arise from CBAs and claims that substantially hinge upon the analysis or interpretation of collective bargaining agreements. *Id.*

"[F]ederal labor policy requires that individual employees wishing to assert [labor] contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress." *Id.* at 1039 (internal quotation marks omitted; emphasis in the original). Additionally, unless the employee utilizes the contractual procedures for settling his labor-contract dispute, his independent suit in district court based upon that dispute must be dismissed. *Id.* (internal quotation marks omitted).

Relying upon exhibits attached to its pleadings, Cassens, in its motion to dismiss, maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims. (Mot. at 2-3.) Cassens asserts that Plaintiffs, as union members, were subject to CBAs entitled National

Master Automobile Transporters Agreement ("National CBA") and Central-Southern Area Supplemental Agreement ("Supplemental CBA"). (Br. at 1; Molter Aff., Ex. 1.) As Cassens notes, Article 41 of the National CBA provides:

> Physical, mental or other examinations required by ... the Employer shall be promptly complied with by all employees.
>
> Examinations are ... not to exceed one (1) in any one (1) year, except in emergencies or proven necessity.
>
> The Employer reserves the right to select its own medical examiner or physician, and the Union may, if it believes an injustice has been done an employee, have said employee reexamined at the Union's expense. If the two (2) doctors disagree, the Employer and the Union shall mutually agree upon a third (3rd) doctor whose decision shall be final and binding on both parties. The selection of the third (3rd) doctor shall be made within seven (7) days. The expense of the third (3rd) doctor shall be equally divided between the Employer and the Union.
>
> In those states where Workers' Compensation statutes or regulations do not permit an injured employee to select his/her own treating physician, the Employer shall provide a list or panel of no less than three (3) Board-certified physicians from which the employee may choose, unless prevented by state law.
>
> Employees are required to go to the doctor selected by the Employer.

(Art. 41, Ex. B) Cassens maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims because they do not seek to vindicate a substantive right from a source other than Article 41 of the National CBA.[12] (*Id.* at 11)

As an initial matter, "[t]he use of the term 'preemption' in this setting ... has a dissonant ring to it." *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602, 608, 611 (6th Cir. 2004). Making such an observation, the United States Sixth Circuit Court of Appeals opined:

> To say that federal courts ... [may not] hear a claim under one federal act (RICO) because it is "preempted" by another federal act ... is not a natural use of the term "preemption." As federal courts generally use the term, preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.

Trollinger v. *Tyson Foods, Inc.*, 370 F.3d 602, 608, 611 (6th Cir. 2004) (internal quotation marks omitted). The Court further observed that a "cardinal principal of statutory construction" is that, "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both." *Id.* (internal quotation marks omitted). According to the Court, "[a]bsent an intolerable conflict between the two statutes," courts are unwilling to construe the subsequent federal act as repealing any portion of the for-

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[12] *See, e.g. Chicago District Council of Carpenters Pension Fund* v. *Ceiling Wall Sys., Inc.*, 915 F. Supp. 939 (N.D. Ill. 1996).

mer federal act. *Id.* (internal quotation marks omitted).

In any event, Cassens relies upon materials that transcend the pleadings to support its contention that § 301 of the LMRA preempts Plaintiffs' RICO claims. Having already concluded that Plaintiffs' RICO claims fail as a matter of law, the Court declines, in its discretion, to treat the instant motion to dismiss under that rule as a motion for summary judgment pursuant to Rule 56 for purposes of adjudicating Cassens' contention that § 301 preemption affords another ground for summary dismissal of Plaintiffs' RICO claims.

B. IIED CLAIMS

Plaintiffs' complaint, per Count VII, alleges that Defendants subjected each Plaintiff to the intentional infliction of emotional distress ("IIED") in violation of Michigan law. In particular, Plaintiffs' complaint provides:

> Cassens ... and Crawford ... engaged in a "continuous pattern of harassment, abuse, and unethical conduct," as that phrase was used in *Hailes* v. *Liberty Mutual Ins. Co....*, and also fraudulent conduct, intentionally inflicting emotional distress on plaintiffs and on other Cassens[']employees.... This conduct includes the acts alleged by each [P]laintiff in their complaints....

(Compl. at ¶¶ 75-77.)

Having dismissed all claims over which the Court has original jurisdiction under Rule 12(b)(6) for failure to state claims for which relief may be

granted,[13] the Court would normally decline to exercise pendent jurisdiction, under 28 U.S.C. § 1367, over Plaintiffs' IIED claims. *See Hankins* v. *The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). However, because the resolution of Plaintiffs' IIED claims is necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiffs' RICO claims under the McCarran-Ferguson Act, as addressed above, the Court will exercise pendent jurisdiction over Plaintiffs' IIED claims.

Crawford maintains that Plaintiffs' IIED claims fail to state claims for which relief may be granted. (Crawford Mot. at 2; Cassens Mot. at 22.) While the Michigan Supreme court has yet to recognize formally the tort of IIED, it has described the elements that would be necessary to establish those claims. *Roberts* v. *Auto Owners Ins. Co.*, 422 Mich. 594, 697, 603, 374 N.W.2d 905 (1985). Specifically, a plaintiff would have to demonstrate: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *Roberts*, 422 Mich. at 602, 374 N.W.2d 905. As to the requisite extreme and outrageous conduct, the Court has adopted the following standards that Restatement, Torts, 2d § 46, Commend D, sets forth:

> ... [T]he conduct ... [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to

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[13] While Plaintiffs' complaint cursorily alleges that the Court has subject-matter jurisdiction under 28 U.S.C. § 1332, it fails, by virtue of Defendant Margules, to establish the complete diversity of citizenship that § 1332 requires. *See Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999).

> be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, leaving him to exclaim, "outrageous."

Id. at 603, 374 N.W.2d 905.

Plaintiffs, in response, contend that their IIED claims rest upon Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.) Plaintiffs further contend that, under *Broaddus* v. *Ferndale Fastener Div.*, 84 Mich. App. 593, 269 N.W.2d 689 (1978) and *Atkinson* v. *Farley,* 171 Mich. App. 784, 431 N.W.2d 95 (1988), their IIED claims state claims for which relief may be granted. (*Id.*) In *Atkinson,* the Michigan Court of Appeals held that "[a]n insurer's wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." 171 Mich. App. at 790, 431 N.W.2d 95. The Court held, however, that the plaintiff's complaint alleged an IIED claim for which relief could be granted because it alleged the following:

> ... Defendants were in a position of control over [the] plaintiff's sole source of income, and knew that [the] plaintiff was extremely dependent upon the receipt of his [workers' compensation] disability benefits, yet abused their position by interfering with plaintiff's benefits, by ignoring the requirement to deal with his attorney, by threatening to cut off ... [his] benefits, and by demanding that ... [he] repay them a large sum of money.... [D]efendants were abusing their control of

> [the] plaintiff's income ... to harass and intimidate him to gain economic benefit for the insurance company.

Id. at 791, 431 N.W.2d 95. In *Broaddus*, the Michigan Court of Appeals held that the WDCA's exclusive-remedy provision does not bar an action for the intentional infliction of emotional distress surrounding the defendants' alleged collusion in denying workers' compensation benefits where the essence of the tort and the damage alleged is non-physical, such as emotional and mental distress damages. 84 Mich. App. at 597, 600, 600 n.4, 269 N.W.2d 689 (holding that the plaintiffs were not seeking as damages compensation for workers' compensation benefits, and noting that the defendants, on remand, are still free to challenge particular damage claims on the ground that the WDCA renders them compensable so as to bar them under its exclusive-remedy provision). As the Court of Appeals later clarified, *Broaddus* never held that the failure to pay workers' compensation benefits based upon the facts there enabled the plaintiff to recover on his IIED claim. *Lisecki* v. *Taco Bell Restaurants, Inc.*, 150 Mich. App. 749, 755 n.1, 389 N.W.2d 173 (1986). Thus, contrary to Plaintiffs' assertion, neither *Atkinson* nor *Broaddus* sustains a IIED claim based merely upon the fraudulent denial of workers' compensation benefits. (Reply at 4, 6.)

Moreover, in *Hajciar* v. *Crawford & Co.*, the Michigan Court of Appeals even held that a claim that the defendant terminated the plaintiff's workers' compensation benefits to coerce the plaintiff into accepting a lump-sum payment that he had previously refused failed to state the requisite "extreme and outrageous" conduct and, thus, failed to state an IIED claim. 142 Mich. App. 632, 634, 639, 369

N.W.2d 860 (1985). In *Lisecki* v. *Taco Bell Restaurants, Inc.*, the Court of Appeals held that "[t]he facts in *Hajciar* were essentially identical to those presented here, i.e., an allegation by the plaintiff that ... [the defendant] wrongfully terminated [his compensation benefits] ... to further some ulterior motive of the defendants rather than due to the plaintiff's" non-entitlement to those benefits. 150 Mich. App. at 755, 389 N.W.2d 173 (holding so where the plaintiff alleged that the defendant had colluded to claim falsely that the plaintiff's physician had informed the claims' adjuster that the plaintiff had been released to work and where the plaintiff was later discharged from employment and denied workers' compensation benefits). According to the Court, "such conduct simply cannot be characterized as outrageous and atrocious." *Id.* (noting that the plaintiff had an adequate remedy for the termination of benefits with his WDCB claim).

Plaintiffs' complaint asserts that Defendants engaged in a "continuous pattern of harassment, abuse, and unethical conduct." *See Hailes* v. *Liberty Mutual Ins. Co.*, No. 215509, 1999 WL 33326762 (Mich. App. Dec. 28, 1999) (suggesting that "facts evidencing a continuous pattern of harassment, abuse, and unethical conduct" may constitute the requisite "extreme and outrageous conduct" for purposes of stating an IIED claim). Yet, as Crawford aptly notes, it fails to allege any facts that would evidence such conduct. (Crawford Br. at 9.) Rather, as Plaintiffs seemingly concede, the factual allegations underlying their IIED claims simply evidence Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.)

Thus, Plaintiffs' IIED claims fail to state claims for which relief may be granted and are subject to dismissal under Rule 12(b)(6).[14]

III. SUMMARY

For the preceding reasons, the Court:

1) DISMISSES Plaintiffs' RICO claims because they fail to state claims for which relief may be granted, and because the WDCA reverse-preempts those claims under the McCarran-Ferguson Act; and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

SO ORDERED.

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[14] In its motion to dismiss, Cassens maintains that § 301 of the LMRA preempts Plaintiffs' IIED claims because those claims arise from Article 41 of the National CBA and are "inextricably intertwined with" the interpretation of the terms of that CBA. (Cassens Br. at 9.) Because Plaintiffs' IIED claims fail to state claims for which relief may be granted under Michigan law, the Court need not and does not reach this issue.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

No. 05-2089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL BROWN, ET AL.,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT CO., ET AL.,

Defendants-Appellees.

Filed Jan. 5, 2009

BEFORE: MOORE and GIBBONS, Circuit Judges; and ACKERMAN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

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* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX D

SECTION 2(B) OF THE MCCARRAN-FERGUSON ACT

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SELECTED PROVISIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or

citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons)., [FN1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or

other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney

General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income,

or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.